No. 47718-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BATTLE GROUND CINEMA, LLC, a Washington limited liability company,

Plaintiff/Appellant,

v.

ROBERT BERNHARDT and KAREN BERNHARDT, a married couple, et al.,

Defendants/Respondents,

and,

JOSEPH WALKER, as Trustee of the JTW Trust, et al.,

Plaintiffs/Respondents,

v.

ELIE G. KASSAB, an individual; THE GARDNER CENTER LLC; a Washington limited liability company,

Defendants/Appellants.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
Honorable Suzan L. Clark

BRIEF OF RESPONDENTS

Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
Attorneys for Respondents

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I. INTRODUCTION

Kassab's actions required the Owners to legally prove that the world was in fact round (prove a negative – that the third page was not authentic).[1]

Sam Walker, Robert Bernhardt, and Charles Mulligan (collectively the "Owners") bought a commercial shopping center (the Gardner Center) in Battle Ground, Washington, in 2006 from prominent developer and businessman Elie Kassab. Two years earlier, Kassab, through various corporate entities he controlled, caused the Gardner Center as landlord to enter into a 25-year lease with Battle Ground Cinema as anchor tenant. As part of the 2006 sale, Kassab disclosed a notarized, two-page personal guaranty that he signed two years before, guaranteeing performance of the Cinema's lease obligations. The guaranty held Kassab personally liable for the full lease term. After selling the Gardner Center in 2006, Kassab remained as the tenant and owner–operator of the Cinema and the personal guarantor of the 25-year lease.

Six years later, the economic climate had changed. Kassab's profits had fallen. Kassab was struggling to pay the Cinema's rent that he had himself set almost a decade earlier. The Owners gave Kassab significant rent concessions after he had demanded them to do so. But that wasn't enough. Kassab demanded more concessions. When the Owners refused, Kassab threatened to terminate the Cinema's lease with the Gardner Center over supposed public health and safety allegations.

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[1] Clerk's Papers (CP) 9583 (trial court's opinion and order on fees).

The Owners reminded Kassab that, as guarantor, he was personally responsible for paying all rents owed for the full 25-year lease term. At this point, and for the first time ever, Kassab disclosed a purported ***third page*** of the personal guaranty, which by ***its*** terms limited his guaranty obligations to only 10 years. The Owners promptly requested Kassab affirm his personal guaranty for the full 25-year lease term. Kassab not only refused but sued the Owners for breach of lease. The Owners responded by suing for breach of contract and seeking a declaratory judgment that Kassab's personal guaranty was for the full 25-year lease term.

The guaranty's purported third page was at the heart of the ensuing litigation. The Owners deposed 19 individuals and sent over 30 document subpoenas to third parties in an effort to determine the authenticity of the third page. Apart from Kassab and his lawyers, no third party conceivably connected to the litigation produced a copy of the third page. Two document experts concluded the guaranty's third page was a forgery—a "cut-and-paste" fabrication. It was not until the eve of a hearing on contending motions for summary judgment—when a discovery master ordered an *in camera* review of Kassab's privileged communications with his lawyers based on a "very strong showing of fraud"—that Kassab finally affirmed his personal guaranty for the full 25-year lease term.

The trial court granted the Owners summary judgment. The Owners achieved a judicial determination that Kassab's guaranty was for the full 25-year lease term, and that the third page was a forgery. The trial court dismissed Kassab's claims for breach of lease. (The Owners voluntarily

dismissed their alternative claims for relief and their counterclaims.) The trial court awarded the Owners attorney's fees and costs under the lease and under RCW 4.84.185, the frivolous litigation statute.

On appeal, Kassab does not seek to set aside the trial court's summary judgment ruling on the personal guaranty. Kassab does claim that there should have been an evidentiary hearing on the authenticity of the guaranty's purported third page, and that the question of a forgery should have been left for a trial. But Kassab did not request an evidentiary hearing, and he acquiesced in the trial court resolving the forgery issue on summary judgment. Kassab's challenge to the summary judgment dismissal of his breach-of-lease claims and fees award proves meritless.

The litigation below was driven by one, basic fact: Kassab was trying to evade a 25-year personal guaranty obligation by forging a document that, if deemed authentic, would have cut that obligation by more than half. But he got caught in his lie. Proving that someone has lied, particularly when that lie involves forged papers, can be a daunting task.[2] And that was certainly the case here. Ultimately, the forged paper in this case was proven to be a forgery, and Kassab's attempt to evade his 25-year guaranty obligation collapsed. The trial court's fees award is amply supported by the record and was the least our state's judicial system could

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[2] For an historical example of just how difficult it can be to prove a cut-and-paste forgery, *see* Jean-Denis Bredin, THE AFFAIR: THE CASE OF ALFRED DREYFUS (George Braziller: N.Y. 1986) at 172–74 (Commandant Henry's creation of the forgery) & 461–62 (Henry's forgery confirmed by official investigation).

do to render justice to the Owners, who were the target of Kassab's attempted deception.

This Court should affirm and underscore that affirmation by awarding the Owners their fees and costs incurred in this appeal.

II. RESTATEMENT OF ISSUES

1. Forgery of a Purported Guaranty Document. Did the trial court properly conclude on summary judgment that the guarantor of a 25-year lease had tried to evade that obligation by forging a purported third page that, if deemed authentic, would have limited the obligation to only 10 years?

2. Breach of Lease. Did the trial court properly conclude on summary judgment that no genuine issues of material fact exist concerning the Owners' duties to maintain the Gardner Center's common areas, given (1) the lease does not require the Owners to maintain the common areas, (2) the common law does not require the Owners to maintain the common areas under the circumstances at issue in this case, and (3) the Owners fully addressed all alleged issues and within a reasonable period of time cured those issues?

3. Reasonableness of Fees Award. The trial court issued a detailed opinion and order awarding the Owners reasonable attorney's fees, costs, expenses, and disbursements incurred in litigating the Guaranty Case and in defending the Lease Case. Did the trial court properly award the Owners $1.8 million in reasonable attorney's fees, costs, expenses, and disbursements under both the personal guaranty and the lease?

4. Fees Award under the Frivolous Litigation Statute. RCW 4.84.185 permits a trial court to award attorney's fees on an independent basis when the claims and defenses asserted in the litigation are frivolous and advanced without reasonable cause. Did the trial court properly award the Owners fees under RCW 4.84.185, given (1) the trial court concluded the guaranty's third page was a forgery, (2) Kassab continued to assert the authenticity of the guaranty's third page even after two experts concluded it was a forgery, (3) neither Kassab nor anyone else could produce an original of the third page, and (4) Kassab affirmed his 25 year guaranty obligation only after the discovery master entered an order allowing the Owners to pierce the attorney–client privilege under the crime-fraud exception, due to the "very strong showing of fraud" perpetrated by Kassab?

III. RESTATEMENT OF THE CASE

A. Elie Kassab develops the Gardner Center. Kassab, through various corporate entities he controls, causes the Center to enter into a 25-year lease with the Gardner Center's anchor tenant, the Battle Ground Cinema. Kassab personally guarantees the Cinema's lease obligations for the full lease term via a separate two-page, written guaranty signed by him.

Elie Kassab is a real-estate developer in southwest Washington. In 2003, Kassab bought several acres of property in Battle Ground. CP 2648. Kassab, through various corporate entities, developed the Gardner Center. CP 2647. Kassab designed the Gardner Center around a new movie theater and designated anchor tenant, the Battle Ground Cinema. CP 2639, 2954, 4624.

In July 2004, Kassab caused two entities that he controlled—Gardner Center, LLC, and Battle Ground Cinema, LLC—to enter into a 25-year lease to operate the Cinema. CP 2851–89. The annual lease payments varied between $288,000 and $463,229 during the lease term, with payments gradually increasing over time. CP 2857. Attached as a rider to the lease was a two-page personal guaranty. CP 15–16. Kassab personally guaranteed the Cinema's lease obligations for the full lease term via a two-page, written guaranty; the guaranty's second page was signed by Kassab and notarized. CP 16.

Kassab continued to secure long-term leases in the Gardner Center from several commercial tenants. CP 2648–51, 2695–97, 4043–81. As an experienced businessman, Kassab knew the importance of securing personal guarantees to protect his financial investments. He required several tenants to personally guarantee the full terms of their leases. CP 2695, 2697–99, 4622–24, 4627. Kassab often used his own "standard form" guaranty with other tenants. CP 2699.

B. In 2006, Kassab, through his entity the Gardner Center, LLC, sells the Gardner Center to the Owners. As part of the sale, Kassab discloses his separate written, two-page personal guaranty.

In 2006, the Owners[3] bought the Gardner Center from the Gardner Center, LLC—an entity controlled by Kassab—for $12.7 million. CP 3004–27. Kassab profited over $2 million. CP 2683. The Owners assumed

[3] The Owners comprised the Walker Family Trust, Christopher and Lara Walker, the JTW Trust, Robert and Karen Bernhardt, and Charles Mulligan. CP 3004.

the rights and obligations as landlord under the 25-year Cinema lease. CP 3798. Kassab disclosed to the Owners his signed and notarized two-page personal guaranty for the Cinema's full lease term. CP 3040, 3045–48, 3093. The personal guaranty was especially important for the Owners, who sought a long-term investment provided by "the future value of the income streams" from the lease. CP 3092, 3410. While Kassab sold the Gardner Center, he remained the tenant and owner–operator of the Cinema.

C. Twice in 2009, Kassab circulates copies of the two-page personal guaranty produced from his files and internal email correspondence.

Kassab's files and internal email correspondence included copies of the lease with a two-page personal guaranty signed by Kassab and notarized. CP 2657. In February 2009, Kassab's employee, Brooke Pool, emailed Kassab a copy of the lease. CP 2658–60. The email—entitled "Battle Ground Cinema Commercial Lease"—attached the lease with the two-page personal guaranty. CP 3246. In March 2009, a company approached Kassab to buy his three theatres. CP 2627. Kassab directed Pool and his consultant Tammie Ferguson to create a marketing package. CP 2627, 2653–58. Ferguson emailed Pool and Kassab the marketing package that included a copy of the two-page guaranty. CP 3205.

D. In 2010, Kassab tries to evade a debt obligation from another personal guaranty. Kassab concocts a story that he had been released from the guaranty even though neither he nor the debt collector could produce a copy of the purported release.

Kassab's loans with the Bank of Clark County following its collapse were sold to Matrix Advisors IV, LLC. CP 2719. One of Kassab's loans

included a $3,200 loan taken out by his consultant Ferguson's husband, Walter Chase. CP 2720. Kassab had personally guaranteed that loan. CP 2720–21.

Chase later defaulted. CP 2721–22. Matrix Advisors IV sought repayment from Kassab. CP 2722, 3318. Kassab claimed the Bank had already released him from his personal guaranty. CP 2723, 3318. Matrix Advisors IV told Kassab that the file did not show a release of the guaranty and requested Kassab send a copy of the purported release. CP 2723, 3318.

Kassab never produced a copy of the release. CP 2724–28, 3329.

Instead, Kassab offered to give Matrix Advisors IV an affidavit from the Bank's former loan officer stating that the Bank had previously released Kassab from his personal guaranty and that a copy of the release should have been in the Bank's file. CP 2727, 3320. Kassab proposed to buy the loan for "50 percent on the dollar." CP 2728–29. Matrix Advisors IV agreed, and without ever producing a copy of the purported release, Kassab avoided paying the full $3,200 loan that he had personally guaranteed. CP 2729, 3319.

E. In 2011, Kassab demands rent concessions for the Cinema from the Owners. Kassab circulates a copy of the two-page guaranty to his chief financial officer.

From 2006 to 2012, Kassab reported few, if any, problems with the Cinema and surrounding businesses. CP 2738, 3094–95. The Owners consistently and immediately "tried to resolve everything that came up" at the Gardner Center. CP 3094.

By late 2011, Kassab alleged the Cinema was struggling. CP 2634, 3406–07, 4263–64. Kassab asked for rent concessions even though he had set the rent himself almost a decade earlier. CP 3365–68. Kassab sought to defer half of the monthly rent for October and November 2011 and make up the deferment in early 2012. CP 3368.

In exchange for the temporary rent deferral, the Owners demanded copies of financial statements from Kassab's various entities and "security or collateral to protect the risk associated with the deferred rent." CP 3329, 3365, 3367. Kassab refused to provide additional security but reluctantly agreed to turn over his financial statements. CP 3365–66, 3390–93. Kassab provided some financial statements for "E.G. Kassab Companies" but did not include the Cinema's or his personal financial statements. CP 3390–93. Nor was it clear what entities "E.G. Kassab Companies" comprised. CP 3398–99. The statements that were produced showed a "sizeable cash balance" of $1.4 million. CP 3391, 3399. The Owners agreed to reduce temporarily the Cinema's rent.

In October 2011, Kassab emailed his chief financial officer, attaching the two-page personal guaranty. CP 3329–35, 3351, 3375.

F. In 2012, Kassab demands further rent concessions. Kassab refuses to disclose all relevant financial statements. Kassab complains about alleged public health and safety issues and threatens to terminate the Cinema's lease. The Owners agree to address any such issues while reminding Kassab about his personal guaranty of the Cinema's lease obligations.

In May 2012, Kassab demanded $120,000 in rent concessions and notified the Owners of alleged maintenance concerns. CP 3403-04. Kassab

finally provided the Owners with some of the Cinema's financial statements. CP 3405–07. A week later, the Owners reminded Kassab of the "value and importance" of his personal guaranty, and that, "as both the developer and theater operator [he] was the party responsible for the rent structure and rent amounts set forth in the lease." CP 3410. The Owners told Kassab that they were unable to abate the Cinema's rent and that they were "not aware of the [alleged] maintenance issues" but were "committed to addressing any concerns" within their control. CP 3410. The Owners proposed to meet with Kassab to discuss the alleged maintenance issues. CP 3410–11. The Owners told Kassab that they would review their decision to reduce the rent if Kassab turned over his tax returns. CP 3413.

By June 2012, Kassab had still refused to turn over his personal financials. CP 3414. The Owners insisted that unless Kassab disclosed his tax returns and personal financials, the Owners would "look for the full rent payment [by] July 1." CP 3413–14. A day later, Kassab threatened to terminate the lease and to abandon the premises over the alleged maintenance issues. CP 3413.

In July 2012, Kassab notified the Owners that the Cinema's shared garbage corral with the neighboring restaurant was overflowing with garbage. CP 4112, 4117–24. Kassab himself designed the Gardner Center to have the garbage corral placed directly behind the Cinema. CP 2685. The Owners' property manager, Michelle Estep, promptly communicated with the restaurant and the Cinema to remedy the problem. CP 4110–11,

4114. The Owners continued their efforts to remedy the Cinema's alleged garbage and maintenance issues. CP 4125–26.

G. Kassab seeds the records of the Ball Janik firm with a copy of a purported third page to the guaranty using a supposed transmittal letter from "Sharon" at "Matrix Advisors." Kassab then for the first time claims his personal guaranty is valid for only 10 years based on the text of the third page. At Kassab's direction, a copy of the third page is transmitted by the Ball Janik law firm to the Owners.

In August 2012, Kassab requested copies of all loan documents from "Matrix Advisors." CP 2731-35. There followed what appeared to be a letter from "Sharon" at "Matrix Advisers" to attorney Brad Miller at the Ball Janik law firm, attaching only a copy of the Cinema lease with—for the first time—a purported third page to the personal guaranty. CP 2735, 3290, 3579. Ball Janik received the lease and the guaranty's third page. Two days later, Kassab thanked "Larry" from Matrix Advisors for sending the lease. CP 2733–34. Kassab never told Matrix that the other requested loan documents failed to arrive. CP 2735.

One month after the Owners told Kassab they would hold him liable on his personal guaranty for the full lease term, Kassab disclosed for the first time a purported third page to the guaranty limiting his personal obligation under the lease to 10 years. CP 3443, 3589. The purported third page was attached to an August 21, 2012 transmittal memo—in "accordance with [Kassab's] request"—from the Ball Janik law firm to Kassab. CP 3445. The third page states:

> THE LANDLORD AND TENANT RECOGNIZE THAT THIS GUARANTEE WAS DEMANDED BY THE LENDER, AND

THAT THIS GUARANTEE EXPIRES ON THE 10TH ANNIVERSARY OF THE EXECUTION OF THE LEASE.

CP 18.

The Owners requested Kassab affirm his personal guaranty for the full lease term. CP 3594. Kassab refused. CP 1600 ¶ 4.

H. Kassab threatens to vacate the Cinema's premises and to terminate the Cinema's lease over public health and safety allegations.

In September 2012, Kassab told the Owners that he would terminate his lease over public health and safety allegations. CP 3425–27, 4227. This news came as an "absolute shock and surprise" to the Owners. CP 3095. The Owners reminded Kassab that he was in default for rent nonpayment. CP 3588. The Owners reiterated their intent to help resolve Kassab's financial situation with "a short term reduction in rent." CP 3589. The Owners assured Kassab that they were "actively addressing the garbage-related issues." CP 3589. The Owners agreed to temporarily reduce the Cinema's rent by $10,000 each month for one year. CP 2752.

In October 2012, Kassab sent a letter to the Owners confirming the improvements that Kassab wanted the Owners to perform. CP 3577. The Owners continued to discuss with the City of Battle Ground a reasonable timeframe to address the Cinema's sidewalk and curb issues, considering the "weather dependent" nature of the project. CP 2581, 2584.

I. Kassab sues the Owners for breach of the Cinema lease. The Owners counterclaim for breach of contract. In a separate action, the Owners sue for breach of contract and declaratory relief.

In December 2012, Kassab sued the Owners for breach of lease (Lease Case). Kassab alleged the Owners failed to maintain the Gardner Center's common areas and overcharged for common area maintenance fees. CP 2232–34. He alleged that the Owners' breach of their maintenance obligations resulted in "conditions endangering health and safety." CP 2233. The Owners counterclaimed for breach of contract. CP 2292–94.

The Owners sued Kassab and his entities that same month for breach of contract and declaratory relief (Guaranty Case). CP 1802–15. The Owners sought a declaratory judgment that the guaranty's third page was a forgery and that the guaranty is effective for the full 25-year lease term. CP 1807. The Owners also alleged causes of action for fraud, misrepresentation, fraudulent omission, and fraudulent inducement. CP 1808–12.

J. The personal guaranty's purported third page is shown to be a forgery.

The Owners collectively testified at their depositions that Kassab's personal guaranty for the lease was two pages and for the full 25-year lease term. CP 3040, 3045–48, 3093. Property manager Estep testified in deposition that a color copy of the "original" lease that her office kept included a two-page guaranty signed by Kassab. CP 2845. She testified that she had known the guaranty only to contain two pages. CP 2845–46.

Kassab never produced an original copy of the guaranty's purported third page. The third page did not conform to the guaranty's first two pages; unlike the second page, Kassab's signature appeared nowhere on the third page. *Compare* CP 15–16, *with* CP 18. The two-page personal guaranty used the term "guaranty" over 25 times, but never "guarantee," while the guaranty's third page used the term "guarantee" (twice).

An employee at Matrix Advisors IV testified in deposition that his company generally does not generate correspondence. CP 3292. Although the letter purportedly sent by "Sharon" referred to "Matrix Advisors," no "Sharon" worked at Matrix Advisors IV in August 2012. CP 3299–3301. The entity's official name is "Matrix Advisors IV, LLC"—not "Matrix Advisors" as used in the August 2012 letter. A copy of the "Sharon" letter was not in Matrix Advisor IV's files. CP 3291. If Matrix Advisors IV did generate correspondence, it would have been dated and on Matrix Advisors IV letterhead. CP 3291–94, 3297–98. The employee did not believe the "Sharon" letter came from Matrix Advisors IV or any other affiliated entity. CP 3312–14.

Attorney Brad Miller from the Ball Janik law firm neither knew the provenance of the guaranty's third page nor why it ended up at his law firm. CP 3585. Miller testified that he did not work on the lease or the guaranty for Kassab. CP 3585.

During discovery, Kassab identified Wyse Investments as the lender who had requested that he limit his personal guaranty to 10 years. CP 6735. A Wyse Investments representative testified in deposition that Wyse did not

demand or require a 10-year guaranty by Kassab and did not request the guaranty. CP 6745–47. Kassab testified in deposition that Kory Arntson of Wyse Investments suggested using a 10-year guaranty for the lease. CP 4640 ¶ 10; CP 6785. But Arntson did "not recall seeing a lease between the Battle Ground Cinema, LLC and Gardner Center, LLC, or guaranty of such lease, in any form." CP 5675 ¶ 3. Arntson testified in deposition that he never suggested or demanded Kassab sign a personal guaranty for any duration. CP 5676 ¶ 4.

IQ Credit, the lender that financed the Owners' purchase of the Gardner Center, produced a copy of the lease with the two-page guaranty. CP 2667.

The Owners' forensic document examiners concluded that the guaranty's third page was a forgery. James Green concluded the third page was a cut-and-paste fabrication. CP 3596 ¶ 4; CP 3606 ("The fabricated notary page is also the reason an 'original' of the signed Rider has not, nor will become available; such a fabrication will not have genuine 'wet ink' signatures."). Frank Hicks concluded the third page shared a common source with page 16 of the lease. CP 5617. Kassab produced no expert testimony to rebut the Owners' experts' conclusions that the guaranty's third page was a forgery.

The only evidence supporting the authenticity of the guaranty's third page was the self-serving testimony of Kassab and his former assistant Pool. Kassab alleged a multitude of reasons to explain the missing third page: "human error, a faulty feeder in the copier, or the often-repaired scanner."

CP 3672 ¶ 9. Kassab claimed someone in his office forgot to copy the guaranty's third page. CP 4639 ¶¶ 7, 9. Kassab testified in his declaration that he executed a 10-year guaranty. CP 3154 ¶ 3; CP 3193–95. Kassab attached a "true and correct copy" of the lease and the three-page guaranty to his declaration. CP 3154 ¶ 3.

According to Kassab, the lease and guaranty "were drafted by a former employee" using a form provided to him by his lawyers, and his employees delivered to the Gardner Center's property manager all original leases and attachments—including the three-page guaranty. CP 3154 ¶¶ 3–5. Pool testified in deposition that she believed Kassab's personal guaranty was three pages, and if there were only two pages, Pool assumed that a machine malfunction or clerical error explained the discrepancy. CP 4243–45, 4617. Pool and Kassab testified that the original binders containing the Cinema's lease documents would have included a three-page guaranty. CP 4246–47, 4633–35.

Despite promises by Kassab to produce the guaranty's original third page, and the discovery order directing Kassab to "make continuing efforts to locate the original 'blue ink' version . . . and make it available" to the Owners, Kassab never produced an original of the guaranty's third page. CP at 1600 ¶ 6; CP 4467, 4470, 4479. The Owners sought numerous times to inspect the original document to no avail. CP 4470. Despite subpoenas to all persons who could or should have had a copy of the guaranty, no third party conceivably connected to the litigation—apart from Kassab's lawyers—produced a copy of the guaranty's third page. And apart from

Kassab's former assistant's self-serving deposition testimony, no witness could remember a third page to the guaranty. CP 4245–47.

K. After extensive discovery and motions practice focused on the authenticity of the purported third page of Kassab's guaranty, the Owners seek disclosure of Kassab's communications with several of his attorneys, invoking the crime-fraud exception to the attorney–client privilege. A discovery master orders production and *in camera* review based on a "very strong showing of fraud"—but postpones that review pending a hearing on summary-judgment motions brought by the Owners and Kassab.

The Owners propounded comprehensive discovery requests on Kassab. In February 2013, Kassab produced about 2,000 pages of responsive documents but indicated that all relevant electronically-stored information (ESI) had been "destroyed." CP 8111 ¶ 12. The Owners responded to Kassab's discovery requests by producing almost 17,000 pages of documents. CP 66 ¶ 2. The Owners hired electronic discovery consultant Epiq to help preserve and to produce all ESI. CP 8111 ¶ 13.

In July 2013, the trial court appointed a discovery master to help resolve the parties' ongoing discovery disputes. CP 430–32, 2049–50.

The Owners also demanded that Kassab agree to a Computer Inspection Protocol (Protocol) that would enable the recovery of any destroyed ESI. CP 8111 ¶ 14. After the parties had negotiated for months over the Protocol's terms, Kassab's then-attorney, Ben Shafton, signaled a willingness to execute the Protocol. CP 8112 ¶ 16. But then Shafton withdrew, and Kassab's new attorney, Gary Grenley, refused to follow the Protocol. CP 8112 ¶ 17. The Owners moved to compel implementation of

the Protocol. CP 8158–70. Kassab responded by stating under oath in a declaration that the guaranty's third page was authentic and that he had executed it contemporaneously with the lease in 2004. CP 1275 ¶ 3.

The discovery master ordered Kassab to produce all documents relevant to the Protocol. CP 8177. The electronic discovery recovered from Kassab's computers revealed no indication that the guaranty's third page existed before 2012. CP 8113 ¶ 19. Because Kassab continued to represent that the third page was authentic, the Owners sought discovery from all persons or entities who could have known about or possessed the third page. The Owners subpoenaed documents from 30 nonparties and took 19 depositions. CP 8113-14 ¶¶ 20–21. No person or entity produced a copy of the guaranty's third page, except Kassab.

In October 2014, the trial court consolidated the Lease Case and the Guaranty Case, at Kassab's request. CP 1989–90, 2352–54.

In November 2014, the parties sought summary judgment. CP 3616–68; CP 3683–97. The Owners sought summary judgment on their declaratory relief and breach-of-contract claims and on Kassab's breach-of-lease claims. Kassab sought summary judgment on all of the Owners' claims.

As previously discussed (Section III.J), extensive discovery and expert analysis established that Kassab had engaged in an elaborate scheme to defraud the Owners and to exert maximum leverage to extract favorable rent concessions. And because the evidence reflected that Kassab had used his lawyers to perpetrate this scheme, implicating the crime-fraud exception

to the attorney–client privilege, the Owners demanded that Kassab produce all communications between Kassab and his former attorneys. CP 6621–26.

The Owners moved for an *in camera* review of those communications. CP 6664–89. The discovery master ordered an *in camera* review of privileged communications based on "***the very strong showing of fraud***" perpetrated by Kassab. CP 7906 (emphasis added). But the discovery master postponed conducting the review pending the outcome of the summary-judgment motions. CP 8227–28.

L. With the *in camera* review looming, Kassab affirms his personal guaranty for the full 25-year lease term. The trial court grants the Owners summary judgment and dismisses Kassab's breach-of-lease claims. The Owners voluntarily dismiss their counterclaims.

On the eve of the trial court's summary judgment ruling, Kassab finally "affirm[ed]" his personal guaranty for the full 25-year lease term. CP 8116 ¶ 29; CP 8229–30.

In the Guaranty Case, the trial court granted the Owners summary judgment on their claims for breach of contract and declaratory judgment. CP 7918, 7954. The court concluded the Owners "are entitled to judgment against all Defendants declaring the Guaranty to be effective for the entire 25-year term of the Lease[.]" CP 7918, 7954. The court dismissed the Owners' alternative claims as moot. CP 7954. The court based its summary-judgment ruling on Kassab's inability to authenticate the guaranty's purported third page. CP 9577-78, 9583.

In the Lease Case, the trial court dismissed Kassab's breach-of-lease claims. CP 7918. The Owners voluntarily dismissed their counterclaims against Kassab. CP 7926–27, 7955.

M. The trial court awards $1.8 million in attorney's fees, costs, expenses, and disbursements to the Owners, finding that Kassab's claims and defenses were frivolous and advanced without reasonable cause.

The fees hearing occurred on December 3, 2015. The same trial judge that presided over the pretrial discovery and summary judgment rulings also presided over the fees hearing. Over three months after the hearing, the trial court—intimately familiar with the case—awarded the full amount of fees requested by the Owners and concluded that the number of hours billed was reasonable. CP 9573, 9581. Kassab did not dispute the Owners' entitlement to fees or the reasonableness of the hourly rates charged by the Owners' staff and attorneys. CP 8624, 9574, 9580. The court also found that Kassab's claims and defenses "were frivolous and advanced without reasonable cause." CP 9617. The court alternatively awarded fees under RCW 4.84.185 "to make the Owners whole again in light of the strong showing of fraud[.]" CP 9603.

IV. STANDARD OF REVIEW

This Court reviews a summary-judgment order de novo, performing the same inquiry as the trial court. *Washington Fed. v. Harvey*, 182 Wn.2d 335, 339, 340 P.3d 846 (2015). All facts and reasonable inferences are viewed in a light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Summary judgment is proper if no genuine issues of material fact exist. *Harvey*, 182 Wn.2d at 340. "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). Summary judgment is proper when reasonable minds could reach but one conclusion from all the evidence. *Failla v. FixtureOne Corp.*, 181 Wn.2d 642, 649, 336 P.3d 1112 (2014).

V. ARGUMENT

A. The trial court's determination that the guaranty's third page was a forgery was central to the outcome of this case. During proceedings before the trial court, Kassab did not request an evidentiary hearing on the issue and did not dispute that the trial court could decide the issue on summary judgment. Kassab has abandoned any challenge on appeal to the summary judgment on the personal guaranty. Kassab has waived, for all purposes, any procedural or substantive challenge to the trial court's determination that the guaranty's third page was a forgery.

The principal issue below was the duration of Kassab's personal guaranty under the lease. This issue hinged on the authenticity of a supposed third page to that guaranty, which suddenly appeared six years after Kassab sold the Gardner Center to the Owners, and which the Owners contended was a forgery generated by Kassab.

The Owners presented the forgery issue as one for the trial court to resolve:

- "Kassab has not, and cannot, raise sufficient evidence to send the [authentication] issue to the jury." CP 3649.

- "Kassab's proffer of evidence is insufficient to create a genuine issue of material fact regarding the authenticity of the third page." CP 3649.

- "The court should decide this case on summary judgment." CP 3651.

- "The third page is a forgery. It is not genuine. There is no genuine issue of material fact regarding this issue." CP 6701

Kassab now claims that the trial court improperly found "there had been fraud or 'forgery' without a trial or evidentiary hearing." Appellants' Br. at 3. He asserts that absent an evidentiary hearing, those issues "remained unproven at the time of the fee hearing." *Id.* at 46. But Kassab never requested an evidentiary hearing to determine the authenticity of the third page. When a party has "ample opportunity" to request an evidentiary hearing but fails to do so, the issue "may not be raised for the first time on appeal." *State v. Hartley*, 51 Wn. App. 442, 449, 754 P.2d 131 (1988) (citing RAP 2.5(a)); *see also Leen v. Demopolis*, 62 Wn. App. 473, 479, 754 P.2d 131 (1998) ("A litigant may not remain silent regarding a claimed error and later raise the issue on appeal.").

Kassab makes no attempt to show that he was denied the opportunity to request an evidentiary hearing. At the summary judgment hearing, the forgery issue took center stage following extensive discovery and briefing. It would be frivolous for Kassab now to claim he was prevented from requesting an evidentiary hearing on the forgery issue. Kassab chose not to request such a hearing, and that choice has waived the issue on appeal. *Leen*, 62 Wn. App. at 478–79 (holding that the defendant

waived the argument that the trial court should have conducted an evidentiary hearing due to conflicting affidavits by not raising it below).

The trial court concluded on summary judgment that Kassab's personal guaranty was valid for the full 25-year lease term. CP 7917–18, 7953–55. That determination was expressly based on a finding that the third page of the guaranty had been forged. CP 9578.[4] Kassab did not dispute below that the trial court could determine the authenticity of the guaranty's third page on summary judgment. *See* CP 4585, 4587. Nor did Kassab argue below that the authenticity issue was for the trier of fact. Having failed to object to the resolution of the authentication issue below in the face of overwhelming evidence presented by the Owners that the guaranty's third page was not genuine and, indeed, was determined to be a cut-and-paste fabrication by experts, Kassab has waived that issue on appeal. Kassab may not now argue that the trial court improperly took the authentication issue away from the trier of fact when he failed to press that challenge below. *See Parkin v. Colocousis*, 53 Wn. App. 649, 652, 769 P.2d 326 (1989) (failing to object to an affidavit in the trial court on summary judgment waives the issue on appeal).

Kassab has expressly waived any challenge to the trial court's guaranty determination and, consistent with that waiver, has not assigned

[4] As previously discussed (Section III.D), this wasn't the first time that Kassab had tried to evade a debt obligation stemming from a personal guaranty. *See* CP 2720–29, 3318–20.

error to that ruling or argued the issue in his briefing.[5] The trial court's determination that the guaranty's third page was a forgery is conclusive and entitled to deference as this Court reviews Kassab's challenge to the fees award.

B. The trial court did not err in granting summary judgment dismissing Kassab's breach-of-lease claims that the Owners failed to maintain the Gardner Center's common areas and overcharged Kassab for common area maintenance fees.

1. Kassab has waived the overcharge claim.

Kassab argued below that the Owners breached the lease by failing to maintain the common areas and by overcharging Kassab for common area maintenance fees. CP 2232–33. Kassab assigned error to these "two claims" on appeal. Appellants' Br. at 1.

But Kassab's opening brief is devoid of any argument that the Owners overcharged Kassab for common area maintenance fees. *See id.* at 13–17. By failing to support this assignment of error "with argument and citations to authority," Kassab has waived it. *Marin v. King County*, 194 Wn. App. 795, 819–20, 378 P.3d 203 (2016); *see also* RAP 10.3(a)(6); *Kittitas County v. Kittitas County Conservatory*, 176 Wn. App. 38, 54, 308 P.3d 745 (2013) ("Unsubstantiated assignments of error are deemed abandoned."). Accordingly, Kassab's challenge to the trial court's

[5] Kassab is well aware that a reversal of the summary judgment on the guaranty issue would have triggered the crime-fraud *in camera* review of his attorneys' files on remand. CP 7906. Indeed, he dedicates a portion of his argument to requesting that this Court go out of its way to state that the crime-fraud inquiry should not go ahead, even if this Court should reverse the summary-judgment dismissal of the breach-of-lease claims. Appellants' Br. at 47-48. In fact, this Court should refuse to foreclose that *in camera* review, for the reasons stated in Section V.G of this brief.

summary-judgment order is limited to the alleged breach of the Owners' supposed common area maintenance obligations under the lease.

2. The Owners did not breach any duties under the lease.

Parties to a commercial lease have the freedom to contract to impose duties on either party. *Publishers Bldg. Co. v. Miller*, 25 Wn.2d 927, 933, 172 P.2d 489 (1946); *Arnold-Evans Co. v. Hardung*, 132 Wash. 426, 429, 232 P. 290 (1925); *Olson v. Scholes*, 17 Wn. App. 383, 395, 563 P.2d 1275 (1977). Absent evidence of unequal bargaining positions or "elements of injustice" from the risk distribution, a lease must "be enforced as the parties contemplated." *Gabl v. Alaska Loan & Inv. Co.*, 6 Wn. App. 880, 884, 496 P.2d 548 (1972); *see also Snohomish County Public Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wn.2d 829, 271 P.3d 850, 854 (2012). Kassab himself drafted the lease. CP 3154 ¶ 3. No evidence supports that the lease was "negotiated in any manner other than freely, openly and at arms-length." *Gabl*, 6 Wn. App. at 883. Kassab is bound by the express terms of the lease that he drafted. *Montgomery Ward & Co., Inc. v. Annuity Bd. of S. Baptist Convention*, 16 Wn. App. 439, 445, 556 P.2d 552 (1976).

Kassab's second amended complaint fails to cite any lease provision that the Owners allegedly breached. CP 2231–34. On appeal, Kassab points to no lease provision requiring the Owners to maintain the common areas. Of the four purported common areas that formed the basis of Kassab's breach-of-lease claims (the shared garbage corral, the sidewalk, the pond, and the wetland), the lease addresses only one of those areas—management of refuse collection around the shared garbage corral—and

does so by expressly placing the burden on the tenant. CP 3087 ¶ 13 (requiring the tenant to "keep the outside areas immediately adjoining the Premises [Cinema] clean and free from . . . rubbish, and . . . not [to] place or permit any obstructions or merchandise in any of such areas."). The specific basis for Kassab's complaint about the collection of refuse in the shared garbage corral was the adjoining tenant restaurant's poor refuse disposal practices. CP 3674 ¶¶ 15–17; CP 4125–26, 4133–35, 4174-75. But the lease specifically forecloses any duty by the landlord to cure defaults by an adjoining tenant. CP 3087 ¶ 13.

Kassab cites no authority that a court may impose a duty on a landlord to maintain common areas under a lease when the only provisions in the lease that address the issue place the duty on the tenant. "To shift liability from the commercial tenant to the landlord without regard to the other provisions of the lease could cause, rather than cure, inequity." *Gabl*, 6 Wn. App. at 884. This Court should enforce the lease as Kassab himself drafted it and hold that it imposes no duty on the Owners to maintain the common areas.

3. Kassab's attempt to shoehorn claims for breach of the Common Area Maintenance agreement and breach of the Declaration of Covenants, Conditions, and Restrictions into his breach-of-lease claim fails as a matter of law.

Kassab sued the Owners for breach of the lease. Kassab's claims have always been limited to the Owners' duties under the lease. CP 2232 ("First Cause of Action – Breach of Lease – Maintenance Obligations"); CP

2233 ("Second Cause of Action – Breach of Lease – Common Area Maintenance Charges"); CP 4593–97 (opposition to summary judgment discussing purported duties imposed by the lease on the Owners); Appellants' Br. at 13 ("Genuine Issues of Material Fact Precluded Summary Judgment on The Cinema's Claim for Breach of the Lease."). Kassab has continually referred to his case—both below and on appeal—as the "Lease Case." CP 4590 ("Issues of Material Fact Regarding Lease Case No. 12-2-04501-5"); Appellants' Br. at 9 n.6 ("The first case is referred to as the Lease Case[.]").

But before the trial court, and now again on appeal, Kassab has tried to use alleged breaches of two agreements *other than the lease* to prove breach of the lease. This attempt to shoehorn into the lease what are in fact separate and unrelated agreements fails as a matter of law.

(a) The Common Area Maintenance agreement.

In June 2010, the Owners entered into a Common Area Maintenance (CAM) agreement, which included various repair and maintenance duties relating to the Gardner Center. CP 4690–91. The CAM agreement does not incorporate the lease. Neither Kassab nor any other Gardner Center tenant is a signatory to the CAM agreement. If Kassab believed the Owners were shirking their common area maintenance responsibilities under the CAM agreement, and further believed that tenants were the intended beneficiaries of that agreement, Kassab should have sued the Owners for breach of the CAM agreement. And even if Kassab had successfully sued the Owners for breach of the CAM agreement, Kassab would only be entitled to relief for

breach of that agreement. The CAM agreement has no relevance to Kassab's beach-of-lease claim.

(b) The Declaration of Covenants, Conditions and Restrictions.

Kassab also points to the Declaration of Covenants, Conditions, and Restrictions (Declaration) as supposed evidence that the Owners breached their duty to maintain the common areas *under the lease*. *See* Appellants' Br. at 14. The Declaration, signed by Kassab on behalf of the Gardner Center, LLC, in 2004, contains a covenant requiring the "Declarant" to maintain the common areas. CP 4674 § 6.4. But a covenant to maintain common areas will bind a future landowner only if that landowner has been made a party to the covenant. *Thorstad v. Federal Way Water & Sewer Dist.*, 73 Wn. App. 638, 642, 870 P.2d 1046 (1994) ("[R]ecordation of covenants alone is insufficient to bind a subsequent grantee of the land if that grantee has not specifically been made a party to the covenants, either in the deed or otherwise."). As Stoebuck and Weaver have explained:

> Many lawyers probably believe that a landowner, such as a subdivider, restricts his land by recording a declaration of covenants. That is false. A restrictive covenant will arise only later when, in the conveyance of all or part of the land, the contract or deed of conveyance refers to, incorporates by reference, the declaration of covenants by language that makes them binding upon one or both parties. One must be able to find in the contract or deed of conveyance such an intent.

17 STOEBUCK & WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 3.2 (updated electronically May 2016).

The Owners were not made parties to the Declaration. Kassab has made no argument based on the deed. Neither the lease nor the purchase and sale agreement mentions the Declaration or any covenants external to the lease. CP 2772–2811 (lease), CP 3004–28 (purchase and sale agreement). Instead, the lease contains an integration clause stating that the lease and its attached exhibits—which do not include the Declaration—"constitute the sole and exclusive agreement between the parties with respect to the Premises." CP 2252 § 16.11. An integration clause is strong evidence that the parties intended the contract be the complete and final expression of their agreement. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 579–80, 998 P.2d 305 (2000). And that evidence contradicts Kassab's attempt to interject the terms of the Declaration into the lease.

Moreover, under Washington's "context rule," extrinsic evidence may not be used to "'vary, contradict or modify the written word.'" *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (2014) (quoting *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005)). The covenants in the Declaration contradict the only lease provision addressing Kassab's concerns with the common areas. *Compare* CP 4674 § 6.4 ("Declarant shall maintain the Common Area Facilities, or cause them to be maintained, in good order, condition and repair."), *with* CP 3087 ¶ 13 ("Tenant shall keep the outside areas immediately adjoining the Premises [e.g., common areas] clean and free from . . . rubbish[.]").

Kassab may not use the terms of a Declaration he created two years before entering into the lease with the Owners to impose common area duties that are unsupported by the terms of the lease and would in fact contradict the terms of the lease addressing that subject. Kassab cannot show that the terms of the Declaration became a part of the lease. The Declaration, like the CAM agreement, has no relevance to Kassab's beach-of-lease claims.

4. Because Kassab raised his common law duty-to-maintain claim for the first time in his opposition to summary judgment, this Court should decline to review it.

Kassab did not plead a claim for common law duty to maintain. CP 2231–34. Kassab raised that claim for the first time in his opposition to summary judgment. CP 4595–96.

A complaint must "apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest." *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469–70, 98 P.3d 827 (2004) (internal quotation marks and citation omitted). CR 15 sets forth the procedure to amend pleadings to add an additional claim or theory, and that requirement may not be circumvented by raising the issue in opposition to a motion for summary judgment. *See, e.g.*, *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996) (applying comparable Fed. R. Civ. P. 15) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."); *Baden Sports, Inc. v. Molten*, No. C06–210MJP, 2007 WL 2056402, at *12 (W.D. Wash. 2007) (same). "A party who does not plead a cause of action or theory of recovery cannot

finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Kirby*, 124 Wn. App. at 472.

Kassab's common law duty claim was improperly interjected for the first time into the case when Kassab raised it in his opposition to summary judgment. While the trial court did not explicitly dismiss the claim on that ground, this Court "may sustain a trial court on any correct ground, even though that ground was not considered by the trial court." *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). This Court should decline to review Kassab's common law duty-to-maintain claim.

5. The Owners did not materially breach any common area maintenance or repair obligations they might be found to owe under the common law.

Under the common law, absent an express agreement or an implied undertaking, a landlord has no duty to maintain common areas unless the area requiring repair was an area over which the landlord had expressly retained control. *Cherberg v. Peoples Nat'l Bank of Wash.*, 88 Wn.2d 595, 601, 564 P.2d 1137 (1977); *see generally* 17 STOEBUCK & WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 6.38 ("The traditional common law rule, still applicable to non-residential leases in Washington, is that neither landlord nor tenant has any general duty to make repairs to the lease premises. Certainly that is true for the landlord, who in the absence of a repair clause or of an implied undertaking to repair, has no duty to make repairs.").[6] The landlord's duty to repair does not arise until it

[6] In his opening brief, Kassab cites *Resident Action Council* for the proposition that "a landlord is presumed to retain control over all common areas of its leased premises
(Footnote continued next page)

learns of the need and until it has had a reasonable time to do the work. *Marrion v. Anderson*, 36 Wn.2d 353, 356, 218 P.2d 320 (1950); *Franklin v. Fischer*, 34 Wn.2d 342, 348, 208 P.2d 902 (1949); *see also O'Brien v. Detty*, 19 Wn. App. 620, 621–23, 576 P.2d 1334 (1978). Even if the Owners owed a duty to maintain or to repair the common areas as claimed by Kassab, as a matter of law the Owners did not breach that duty.

(a) The Owners promptly cured within a reasonable time the Cinema's alleged refuse issues that allegedly attracted insects, rats, and other pests.

The Owners first learned of the alleged maintenance issues with the neighboring restaurant's refuse handling practices in July 2012. CP 4110, 4131. The Owners promptly responded and actively worked with the restaurant, the local waste management company, and other Gardner Center tenants to remedy and to continually monitor the alleged issues. CP 4110–12, 4125–35, 4140. The Owners had the garbage corral cleaned. CP 3589, 3591. The Owners moved the restaurant's leaky food waste carts and trash dumpsters "to a different location, away from the [C]inema, to prevent future disputes." CP 3589. Kassab had designed the garbage corral to be located directly behind the Cinema and in close proximity to the restaurant. CP 2740–41, 3589. While Kassab complained of the neighboring

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and is responsible for maintaining these areas." Appellants' Br. at 16 (citing *Resident Action Council v. Seattle Hous. Auth.*, 162 Wn.2d 773, 789, 174 P.3d 84 (2008) (Madsen, J., dissenting)). But Kassab fails to note that this quote comes from a dissenting opinion in a case involving a challenge to free-speech rights in the residential context. *Resident Action Council* does not apply here.

restaurant's refuse handling practices, he allowed the restaurant to dump its garbage in the garbage corral behind the Cinema. CP 2744.

For the alleged pest issues, the Owners had a pest control management company promptly remove the insect nests. CP 3426, 3433, 3591. The Owners continued to maintain "pest management, including immediate response by pest control services to identified issues." CP 3591. Kassab admits the Owners remedied the insect and pest issues by 2013 and does not contend on appeal that the Owners' response to the alleged refuse and pest issues was untimely or otherwise unreasonable—a necessary predicate to support a breach of the common law duty to maintain. CP 2740.

(b) The Owners promptly cured within a reasonable time the Cinema's walkways, parking lots, and curbs that allegedly fell into disrepair and posed safety concerns.

Kassab notified the Owners of alleged safety concerns for the Cinema's sidewalks, walkways, and curbs for the first time in September 2012. CP 3426–27. The Owners responded ten days later, listing the "current maintenance projects at the Gardner Center," including the power washing of all concrete and asphalt; completing the wooden ramp on the patio; and scheduling a meeting with contractors to investigate and to repair the condition of the yellow non-skid masonry overlay and concrete sidewalks and curbs. CP 3588–91. In October 2012, the Owners told Kassab that a contractor "would be out to remove the sidewalk, excavate the existing subgrade, import new gravel and compact, and then form and pour

the concrete." CP 7341. In November 2012, the Owners told Kassab again that a contractor had "installed the crack seal material to remove the potential trip hazards," and "in order to remove the sidewalk, compact, and re-pour," the contractor would need "a good solid 3 days of no rain." CP 7341. In January 2013, a City of Battle Ground building official recognized that the timeline to deal with the Cinema's sidewalk issue "is somewhat weather dependent" and "beyond anyone's control." CP 4216. The Owners continued to coordinate the project for fixing the Cinema's sidewalks and curbs. CP 4219–25.

Notably, Kassab admitted in deposition that the Owners cured the alleged defective sidewalks, walkways, and curbs in about nine months, and that the sidewalks no longer posed a safety risk. CP 2739. Kassab cites no authority that nine months is an unreasonable amount of time to cure the alleged defects. The record supports that upon notice of the alleged defects, the Owners promptly remedied the defective conditions within a reasonable time.

(c) The Owners promptly cured within a reasonable time any problems associated with the Cinema's pond and water feature.

Kassab alleged in his second amended complaint that the Owners allowed the Cinema's water feature to overflow several times and to flood the Cinema. CP 2233. While the pond overflowed in August 2012 because of a nonfunctioning float, "the problem was fixed immediately" and "cleaned up on the same day the overflow occurred." CP 3591. Kassab first notified the Owners in September 2012 that any overflow from the

pond may have entered the Cinema. CP 3591. Upon notice, the Owners promptly responded that they would continue to monitor and work on the pond to cure any issues. CP 3591. In October 2013, the Owners told Kassab they found it "concerning that the pond allegedly overflowed after someone apparently turned the water supply to the pond back on after it had been turned off by the Owners' contractor." CP 3594. Kassab admitted in deposition that the Cinema's pond no longer posed a safety risk or a risk of overflowing. CP 2739–40.

(d) No evidence supports that the Owners' actions in allowing a wetland under Kassab's control to be used as a community garden attracted pests to the Gardner Center and endangered the public health and safety.

Kassab alleged in his second amended complaint that the Owners' use of the wetland as a community garden attracted pests and endangered the public health and safety. CP 2233. Nothing in the record supports this allegation. Kassab chose to develop the Gardner Center next to a wetland. CP 2741. Kassab retained ownership of the wetland after he sold the Gardner Center to the Owners. CP 2741–42. More importantly, and fatal to Kassab's allegation, because Kassab did not argue in his opening brief that the Owners breached the lease by using the wetland as a community garden and thereby attracting pests to the Gardner Center, he has waived the argument on appeal. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments unsupported by authority or any reference to the record may not be considered on appeal).

Whether under the lease, the CAM agreement, the Declaration of CC&Rs, or the common law, any duty of the Owners to maintain or to repair the common areas cannot be any greater than the obligation to respond within a reasonable time to cure the alleged breaches. And the Owners did exactly that. This Court should conclude no genuine issues of material fact exist for Kassab's breach-of-lease claims and affirm the trial court's dismissal of those claims on that ground.

6. Given the pleadings and the proof on Kassab's breach-of-lease claims, the most that Kassab might be entitled to is a limited remand that could result in no more than an award of money damages, and certainly not relief from further performance of his rental obligations.

The usual measure of damages for a landlord's breach of a duty to maintain or to repair common areas is the diminution in value of the use of the property. *Pappas v. Zerwoodis*, 21 Wn.2d 725, 732, 153 P.2d 170 (1944). Consequential damages, such as lost profits, that have been caused by the landlord's wrongful act may also be recovered if pleaded and proved. *See id.* at 733; *Willard v. Cunningham Bros.*, 172 Wash. 386, 389, 20 P.2d 35 (1933); *Matzger v. Arcade Bldg. & Realty Co.*, 102 Wash. 423, 428–29, 173 P. 47 (1918). Such damages "must be shown with a reasonable degree of certainty and accuracy, and the proof establishing the loss must be clear and convincing, free from speculation or conjecture." *Pappas*, 21 Wn.2d at 733–35. Alternatively, a tenant may make the repairs and recover, or set off against rent, their reasonable cost. *Thomson Estate v. Washington Inv. Co.*, 84 Wash. 326, 328–29, 146 P. 617 (1915).

The landlord's actions will excuse the tenant's performance and justify repudiation of the contract in two circumstances: when those actions constitute a material breach or a constructive eviction. *Park Ave. Condominium Owners Ass'n v. Buchan Devs.*, 117 Wn. App. 369, 383, 71 P.3d 692 (2003) (material breach); *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 8, 329 P.3d 83 (2014) (constructive eviction). Kassab neither pleaded nor argued below that the Owners' alleged failure to maintain the common areas was a material breach or a constructive eviction entitling him to terminate the lease. CP 2232–33.[7] Nor does Kassab make these arguments on appeal. These arguments are therefore waived. *Cowiche Canyon*, 118 Wn.2d at 809.

Even if this Court concluded a genuine issue of material fact remained for Kassab's breach-of-lease claims, the most that Kassab might be entitled to under the lease would be money damages.

Although breach of a contract may give rise to damages, only a material breach justifies a repudiation of the contract. *Cartozian & Sons, Inc. v. Ostruske-Murphy, Inc.*, 64 Wn.2d 1, 5–6, 390 P.2d 548 (1964). For a breach to be material, it must be substantial. *Cent. Christian Church v. Lennon*, 59 Wash. 425, 428, 109 P. 1027 (1910). A material breach is one serious enough to justify the other party in terminating the contract and one

[7] A nonbreaching party has two options in the event of a material breach: that party may "declare a material breach and announce its intention to terminate the contract" or may "continue the contract in effect and sue for damages incurred when performance is finished." *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 591–92, 167 P.3d 1125 (2007). Kassab effectively chose the latter option here and is thus precluded from seeking termination of the contract as a remedy if this Court remands on a limited basis.

that substantially defeats the purpose of the contract. *Park Ave. Condominium*, 117 Wn. App. at 383.[8] A breaching party has a reasonable opportunity to cure before the nonbreaching party may terminate the contract. *Rosen v. Ascentry Techs., Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765 (2008). While the question of whether a breach is material is generally a fact question, it may be decided as a matter of law when reasonable minds could reach but one conclusion. *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003); *see also Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 83, 765 P.2d 339 (1988) (determining material breach as a matter of law).

Reasonable minds could reach only one conclusion: the Owners' actions did not amount to a material breach of the lease. Kassab continued operating the Cinema and never closed it. The purpose of the lease—attracting customers to the Gardner Center and the Cinema—was never substantially defeated. The Owners promptly remedied any and all alleged issues with the common areas upon notice by Kassab. There can be no genuine issue of material fact: the Owners did not materially breach the lease.

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[8] To determine whether a breach is material, a court considers: (1) whether the breach deprives the injured party of a benefit he or she reasonably expected, (2) whether the injured party can be adequately compensated for the loss of that benefit, (3) whether nonperformance will result in a forfeiture by the injured party, (4) whether the breaching party is likely to cure the breach, and (5) whether the breach comports with good faith and fair dealing. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys.*, 53 Wn. App. 77, 82, 765 P.2d 339 (1988) (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

Common law remedies for breach of a lease include constructive eviction. *McKennon v. Anderson*, 49 Wn.2d 55, 62, 298 P.2d 492 (1956); *Aro Glass & Upholstery Co. v. Munson–Smith Motors, Inc.*, 12 Wn. App. 6, 8, 11, 528 P.2d 502 (1974). A constructive eviction occurs when the landlord's actions deprive or materially impair the tenant's right to the beneficial use and enjoyment of the premises. *Old City Hall*, 181 Wn. App. at 8; *Gibson v. Thisius*, 16 Wn.2d 693, 696, 134 P.2d 713 (1943). "A tenant is not constructively evicted from a leasehold unless the landlord has failed to perform a duty that exists under the lease." *Olson v. Scholes*, 17 Wn. App. 383, 394, 563 P.2d 1275 (1977); *see also Tucker v. Hayford*, 118 Wn. App. 246, 254 n.8, 75 P.3d 980 (2003) (stating that lease premises are deemed "untenantable" for purposes of constructive eviction when "the premises are unfit for the purpose for which they are leased."). For commercial leases, the interference must be serious enough to substantially interfere with possession and the tenant's conduct of business. *Old City Hall*, 181 Wn. App. at 8–9; *see also Washington Chocolate Co. v. Kent*, 28 Wn.2d 448, 454–55, 183 P.2d 514 (1947) (rat infestation); *Buerkli v. Alderwood Farms*, 168 Wash. 330, 334–35, 11 P.2d 958 (1932) (improvements or facilities necessary to its use become unusable); *John B. Stevens & Co. v. Pratt*, 119 Wash. 232, 233–34, 205 P. 10 (1922) (premises dangerous from disrepair); *Matzger v. Arcade Bldg. & Realty Co.*, 102 Wash. 423, 425–26, 173 P. 47 (1918) (shutting off of light and ventilation). A constructive eviction "prospectively releases the tenant from the obligation to pay rent" if the tenant abandons the premises within a

reasonable period of time after the interference. *Old City Hall*, 181 Wn. App. at 8; *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 486, 663 P.2d 141 (1983) (stating that a tenant waives the remedy by remaining in possession of the leased premises).

To the extent Kassab seeks a constructive eviction as a remedy for the Owners' alleged breach, a party waives constructive eviction if that party continues to pay rent and does not vacate the premises in the event of default or material breach. *Old City Hall*, 181 Wn. App. at 12; *Draper*, 34 Wn. App. at 486 (citing *Tennes v. American Bldg. Co.*, 72 Wash. 644, 647, 131 P. 201 (1913)). Kassab admits that he has "continue[d] to pay rent." Appellants' Br. at 27; *see generally* CP 3675 ¶ 21 ("I never withheld rent due from the Cinema, never moved out of its building, and never even closed its operations temporarily."). Kassab remains as the owner–operator of the Cinema and tenant of the Gardner Center. Kassab has waived constructive eviction as a remedy for the Owners' alleged breach.

On this record, even if the Owners owed Kassab a duty to maintain the common areas and the alleged refuse, pest, curb, wetland, and pond issues constituted a material breach of the lease, the Owners remedied those issues within a reasonable time. Kassab admitted in his deposition testimony that, as of November 2013, all of the Gardner Center's maintenance concerns—including the health and safety issues—had been cured by the Owners. CP 2738–41. ***Kassab never stopped paying rent or even temporarily vacated the Cinema due to the purported conditions endangering the public health, safety, and welfare.***

No evidence supports that Kassab was damaged by the Owners' actions in curing within a reasonable time the Gardner Center's common areas. Kassab's true motive in suing the Owners for breach of lease was to circumvent his 25-year personal guaranty, *see* CP 3427 ("A landlord who fails to repair or take actions necessary under these public health and safety requirements is not only liable for injuries to third parties, but landlord's inactions may allow a tenant to terminate the lease without penalty"), and he failed in this effort as a matter of law. Given the pleadings and proof on Kassab's breach-of-lease claims, the most that Kassab might be entitled to under the lease would be a limited remand that could result at best in an award of money damages and no relief from further performance of his lease obligations.

C. A fees award is reviewed for abuse of discretion. The trial court's challenged findings of fact will not be disturbed on appeal if supported by substantial evidence. Unchallenged findings are verities.

This Court reviews an attorney's fees award for abuse of discretion. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). Only when a trial court manifestly abuses its discretion must this Court reverse a fees award. *Id.*

A fees award must be supported by findings and conclusions. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), *overruled on other grounds by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643,

272 P.3d 802 (2012). This Court reviews a trial court's findings supporting a fees award for substantial evidence. *Stiles v. Kearney*, 168 Wn. App. 250, 260, 277 P.3d 9 (2012). Substantial evidence is the "quantum of evidence" sufficient to "persuade a reasonable person that a finding of fact is true." *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008).

In determining whether substantial evidence exists to support a finding, this Court reviews the record is "in the light most favorable to the party in whose favor the findings were entered." *Marriage of Gillespie*, 89 Wn. App. 390, 404, 948 P.2d 1338 (1997). A fees award is "presumed to be correct," and this Court construes the findings of fact to support the award whenever possible. *Smith v. Shannon*, 100 Wn.2d 26, 35, 666 P.2d 351 (1983). "So long as substantial evidence supports the finding[s], it does not matter that other evidence may contradict [them]." *Marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002).

D. Kassab has waived the majority of his assignments of error to the trial court's findings because those assignments of error are unsupported by argument.

Reviewing Kassab's opening brief confirms that the overwhelming majority of the assignments of error are unsupported by argument. "[U]nchallenged findings of fact become verities on appeal." *Humphrey Indus., Ltd. v. Clay St. Assocs., LLC*, 176 Wn.2d 662, 675, 295 P.3d 231 (2013). A finding of fact becomes a verity unless an appellant both assigns error to the finding and supports that assignment with argument and citation to authority. *Cowiche Canyon*, 118 Wn.2d at 809; *Watson v. Maier*, 64 Wn. App. 889, 899, 827 P.2d 311 (1992).

Kassab assigns error to all but one finding of fact. But by failing to argue that the majority of those findings lack substantial evidence, Kassab has conceded facts sufficient to support all of the trial court's conclusions that he challenges on appeal. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) ("A party abandons assignments of error to findings of fact if it fails to argue them in its brief."); *see also Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990) (holding that a party claiming error has the burden to show that a finding of fact is not supported by substantial evidence). Of particular note is Kassab's failure to argue these assignments of error:

- "This Court finds that the Guaranty Case and Lease Case are interrelated and involve a common core of facts." CP 9576.

- "This Court finds that the gravamen of the entire Guaranty Case centered on proving one crucial fact—that the Guaranty is effective for 25 years." CP 9577.

- The "Court finds that the Owners reasonably dismissed comparatively minor counterclaims in the Lease Case to avoid continued and unnecessary litigation in light of the summary judgment ruling." CP 9578.

- "[T]his Court finds that the Owners prevailed on breach of contract and declaratory relief, which [are] inseparable from the issues presented in the Owners' alternative claims for relief." CP 9577.

- "This Court finds that the Owners' counsel had reasonable and justifiable cause to subpoena and depose each individual and entity." CP 9578.

- The "Court finds that the depositions and subpoenas proved useful and critical to obtaining summary judgment in both the Guaranty Case and Lease Case." CP 9578

- "This Court finds that extensive electronic discovery was necessary and proved useful." CP 9578.

"A party waives an assignment of error not adequately argued in its brief." *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002). These factual challenges are waived, and this Court must treat these findings as verities on appeal.

E. Kassab's fees challenge fails on the merits because the $1.8 million fees award is—consistent with the lodestar—eminently reasonable under the circumstances.

1. Substantial evidence supports the trial court's findings that in turn support its conclusions that the fees award is reasonable.

A reasonable fees determination starts with calculating the "lodestar"—the total hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Berryman v. Metcalf*, 177 Wn. App. 644, 660, 312 P.3d 745 (2013). The hours reasonably expended must be spent on claims with a "common core of facts" and "related legal theories." *Chuong Van Pham*, 159 Wn.2d at 538. The trial court "should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Id.* While the lodestar is only the starting point in determining reasonableness, it presumptively represents a reasonable fee. *Berryman*, 177 Wn. App. at 660, 678; *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 738, 281 P.3d 693 (2012). The trial court may also "be aided by expert opinion" in examining the "reasonableness of the hours claimed." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 156, 859 P.2d 1210 (1993).

The trial court properly explained its reasoning to support its findings and conclusions on fees. The same judge presided over this entire case. The trial court was intimately familiar with the parties, had a superior understanding of the litigation history, watched the case unfold, and was in the best position to determine which hours should be included in the lodestar calculation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); *Chuong Van Pham*, 159 Wn.2d at 540; *Berryman*, 177 Wn. App. at 659. The trial court issued a detailed 33-page opinion and order on fees and entered "meaningful findings and conclusions" justifying its award of reasonable fees. *Berryman*, 177 Wn. App. at 677. The trial court's detailed fees order provides sufficient information to enable meaningful appellate review.[9]

Kassab's pertinacious refusal to affirm his personal guaranty for the full lease term required the Owners to effectively prove that "the world was in fact round (prove a negative – that the third page was not authentic)." CP 9583. The Owners' attorneys provided extensive documentation of their efforts. *See Berryman*, 177 Wn. App. at 664 ("A useful way for a trial court

[9] Kassab had ample opportunity to evaluate and to object to the Owners' proposed findings before the trial court adopted them. *See 224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 728, 281 P.3d 693 (2012). The Owners submitted their proposed findings supporting their proposed opinion and order on fees three months before the trial court entered its opinion and order on fees. Kassab had over three months to object or clarify errors or misstatements contained in the Owners' proposed findings. Kassab could also have submitted a motion for reconsideration under CR 59. Even now, Kassab is able to challenge the court's findings and conclusions on appeal. Kassab cites no authority on appeal that a trial court abuses its discretion by largely adopting a party's proposed findings of fact and conclusions of law, especially when substantial evidence in the record supports those findings and those findings in turn support the conclusions.

to determine a lodestar is to prepare a simple table that lists, for each attorney, the hours reasonably performed for particular tasks and the rate charged, which may vary with the type of work."). The Owners submitted detailed, contemporaneous billing records listing the hours reasonably performed for each particular task and the rate charged. CP 8232–8368. Nothing in the record suggests that the time claimed for particular events during the litigation was inflated or that the Owners intentionally prolonged litigation to drive up fees. Rather, the Owners worked quickly and efficiently for over two years to prove ultimately that the guaranty's third page was a forgery.

The Owners submitted multiple declarations from former Washington State Supreme Court Justice Philip Talmadge, the author of the leading Washington treatise on attorney's fees. CP 8002–11, 9332–37. Talmadge testified in his declaration that the number of hours requested by the Owners was "reasonable under the circumstance" to secure a successful result. CP 8010 ¶ 10; CP 9337 ¶ 9. Although the hours requested were "large for a case resolved on summary judgment," Talmadge concluded that the Owners' hours were a reflection of, and necessitated by, Kassab's actions. CP 8010 ¶ 10. Talmadge commended the Owners for exercising "commendable billing judgment." CP 8009.

This was a complex commercial dispute with more than 500,000 documents produced during discovery. Discovery became so contentious that the trial court ordered the appointment of a discovery master. A Computer Inspection Protocol had to be implemented. To suggest that this

was a run-of-the-mill contract dispute, as Kassab does here, is belied by the voluminous record before this Court. The depth of the motions practice to prove that the guaranty's third page was in fact a forgery—and did not exist in any form—reflects the level of complexity presented by this litigation. The litigation effectively precluded the Owners' counsel from devoting significant time and energy to other cases for more than two years. CP 8046 ¶ 12; CP 8118 ¶ 41.

Kassab challenges the trial court's finding that "the amount in controversy" was "approximately $5,000,000." CP 9574; Appellants' Br. at 27 n.17. But the record supports that the difference between a 10-year lease and a 25-year lease—based on the lease's gradual rent increase each year—is over $5,000,000 in rent income. CP 3057. Kassab had previously threatened twice to terminate the lease. CP 3413, 3425. The Owners stood to lose 15 years' worth of lease payments on an investment for which the Owners had paid $12.7 million. CP 8044 ¶ 7. Absent Kassab's 25-year personal guaranty, Kassab could terminate the lease, vacate the premises, and seriously diminish the Gardner Center's value. CP 8042 ¶ 5.

The proportionality of the fee award to the amount at stake is a vital consideration when the suit's "sole objective" is to obtain compensatory damages. *Berryman*, 177 Wn. App. at 660. The fees expended compared to the damages at stake provides a barometer for the reasonableness of fees sought. *Id.* ("In assessing the reasonableness of a fee request, a 'vital' consideration is the size of the amount in dispute in relation to the fees requested." (internal quotation marks and citation omitted)); *see also Travis*

v. Washington Horse Breeders Ass'n, Inc., 111 Wn.2d 396, 409–10, 759 P.2d 418 (1998) (stating that "the amount in controversy is merely . . . a factor to be considered" and "is not in itself decisive."). The Owners' "sole objective" here was not just to obtain breach-of-contract expectation damages; the Owners sought to prove that the guaranty's third page never existed in any legitimate form and to affirm Kassab's personal liability on the 25-year lease. The $1.8 million fees award in a case involving no less than $5 million at stake is eminently reasonable under these circumstances. The lodestar figure does not grossly exceed the amount in controversy. *Weeks*, 122 Wn.2d at 150 (suggesting that a downward adjustment should occur in cases when the lodestar "grossly exceeds" the amount involved).

2. The trial court properly considered "billing judgment" as a factor in determining the reasonableness of the fees award.

Kassab claims the Owners failed to use billing judgment. According to Kassab, the fees expended were out of proportion to the stakes and the legal effort needed to achieve a successful result. But Kassab's efforts to second guess the Owners' litigation strategy—a strategy that ultimately achieved the desired result—is a futile exercise in revisionist history.

The U.S. Supreme Court over thirty years ago exhorted attorneys to exercise "'billing judgment' with respect to hours worked." *Hensley v. Eckhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 40 (1983). Two published Washington cases have addressed what "billing judgment" means in the fees context. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d

1210 (1993) (concluding that attorney failed to use billing judgment in an "uncomplicated dispute over 120 vacuum cleaners worth less than $20,000" and a $200,000 attorney's fee claim "for over 10 times the amount in contention[] in a run-of-the-mill commercial dispute"); *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013) (concluding that attorneys failed to use billing judgment "when they fashioned a claim for almost $292,000 in attorney fees out of a run-of-the-mill minor injury case" resulting in a jury verdict of $36,542).

Unlike in *Fetzer* and *Berryman*, this was not a run-of-the-mill contract case. Discovery entailed over 500,000 documents. Kassab's discovery tactics required the Owners to file several motions to compel, including to implement the Computer Inspection Protocol. The trial court had to appoint a discovery master. Disavowal of the guaranty would have cost the Owners over $5 million in rent income. The $1.8 million fees request pales in comparison to the amount in controversy. The Owners' costs increased in part because Kassab engaged five different lawyers during the litigation, causing substantial delays and responses. Kassab's steadfast refusal to affirm his personal guaranty—even after two experts concluded the third page was a forgery—required the Owners to go to the ends of the earth "to legally prove that the world was in fact round." CP 9583. And the Holland Law Group "exercised commendable billing judgment" by writing off more than $80,000 in time. CP 8009 ¶ 9; *see also* CP 8041–42 ¶ 4; CP 8045 ¶ 11.

3. The trial court properly considered the opposing side's fees in determining the reasonableness of the fees requested.

While a "comparison of hours and rates charged by opposing counsel is probative of the reasonableness of a request for attorney fees by prevailing counsel," such a comparison is not dispositive. *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 354, 279 P.3d 972 (2012). That the Owners billed more hours than Kassab has no bearing on the reasonableness of the Owners' fees because the Owners prevailed and achieved the ultimate result. Nothing suggests that the Owners "loaded up" their bills after they prevailed on summary judgment. *See Cedar Grove Composting, Inc. v. City of Marysville*, 188 Wn. App. 695, 731–33, 354 P.3d 249 (2015) (reducing requested fees by 40 percent due to "the large number of hours Cedar Grove billed after it prevailed on summary judgment and therefore knew it would receive an attorney fee award"). The Owners instead voluntarily dismissed their alternative theories of recovery in the Guaranty Case and their counterclaims in the Lease Case "to avoid continued and unnecessary litigation in light of the summary judgment ruling." CP 9578. The record supports that the trial court properly considered the opposing side's fees in determining the reasonableness of its fees award.

4. Segregating the claims in the consolidated action was unnecessary because both cases were interrelated and involved a common core of facts and related legal theories.

Kassab's segregation-of-fees challenge on appeal is limited to his contention that a trial court must segregate between alleged "successful"

and "unsuccessful" claims. Kassab argued below that the Owners failed to segregate fees between the Guaranty Case and the Lease Case. CP 8630–31. But the Owners did segregate the fees between the two consolidated cases. CP 7989. More importantly, the trial court properly concluded that segregation of the fees and costs between the claims in the Guaranty Case and the Lease Case was unnecessary because the cases were interrelated and involved a common core of facts. CP 9591-52. While Kassab assigned error to this finding, it is a verity on appeal because he failed to argue the finding lacks substantial evidence. *Valley View*, 107 Wn.2d at 630.

Kassab claims the trial court should have denied the fees and expenses associated with the Owners' "unsuccessful damages claims" and their voluntarily dismissed counterclaims in the Lease Case because the Owners did not prevail on those claims. Appellants' Br. at 39. Kassab's contention is meritless because the Owners prevailed on the entirety of their interrelated claims. *See Hensley*, 461 U.S. at 435 (stating that when a plaintiff's claims involve a common core of facts or are based on related legal theories, the suit "cannot be viewed as a series of discrete claims" and the focus should be "on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.").

When a plaintiff "has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley*, 461 U.S. at 435. "Normally this will encompass all hours reasonably expended on the litigation." *Id.* "In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Id.*;

e.g., *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 672, 989 P.2d 1111 (1999) ("[W]hen parties prevail on any significant issue that is inseparable from issues on which the parties did not prevail, a court may award attorney fees on all issues."). "Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee." *Hensley*, 461 U.S. at 435. Alternative theories cannot be said to be "unrelated, inseparable claims" if the "attorney's work on each theory is work 'expended in pursuit of the ultimate result achieved.'" *Brand*, 139 Wn.2d at 673 (quoting *Hensley*, 461 U.S. at 435). "The result is what matters." *Hensley*, 461 U.S. at 435.

In the Guaranty Case, the Owners successfully prevailed on their breach of contract and declaratory relief claims. CP 7917–18. The trial court concluded that the personal guaranty is effective for the full lease term. CP 7918. The summary-judgment ruling granted complete relief to the Owners. The trial court did not reach the Owners' alternative claims for fraud and misrepresentation because it dismissed those claims as moot. CP 7954. In the Lease Case, the trial court granted the Owners summary judgment and dismissed all of Kassab's claims. CP 7917–18. The Owners then dismissed comparatively minor counterclaims to avoid unnecessary litigation. CP 9084. The Owners achieved the desired outcome in a judicial determination that the Kassab's personal guaranty is effective for the full lease term. All of the Owners' claims and counterclaims for relief centered on disproving the authenticity of the guaranty's third page. Once Kassab

successfully consolidated the two cases, he inescapably made the personal guaranty the central issue in the litigation. CP 9577. Consequently, the trial court did not need to segregate the fees awarded to alleged "successful" and "unsuccessful" claims, because the consolidated cases involved a common core of facts and related legal theories and were based on achieving the same result. *Id.*

The Lease Case embodied a separate claim for relief. If this Court concluded a genuine issue of material fact existed on the breach-of-lease claim, and on remand Kassab prevailed at trial, then Kassab would be entitled only to the $217,232.37 incurred in segregated attorneys' fees and expenses as found by the trial court. CP 9579.

5. The trial court properly awarded fees for time spent by attorneys representing third parties.

Kassab challenges the trial court's finding that third-party attorney's fees are recoverable. Appellants' Br. at 39–40. Kassab cites no authority that a trial court manifestly abuses its discretion in awarding fees for time spent by attorneys representing third parties—particularly when, as here, the prevailing parties were responsible for paying those fees due to Kassab's actions.

The trial court awarded $102,131 in fees to the Owners for time spent by attorneys independently representing individuals from the Owners' property-management company and lender that Kassab had subpoenaed and deposed. CP 7989, 9599–9600. The Owners' indemnity agreement with those entities required the Owners to reimburse them for their attorney's

fees and costs. CP 9219, 9229, 9269. Because of Kassab's discovery efforts in subpoenaing and deposing representatives from these entities in connection with the consolidated cases, the Owners incurred fees in providing representation. CP 9061 (chart). The plain language of the guaranty and the lease does not limit recovery of fees to those incurred solely to represent the Owners. CP 16, 3067.

Further, under the theory of equitable indemnity, or "ABC rule," when a party's acts to an agreement "have exposed one to litigation by third persons—that is, to suit by third persons not connected with the initial transaction or event—the allowance of attorney's fees may be a proper element of consequential damages." *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 358–59, 110 P.3d 1145 (2005) (internal quotation marks and citation omitted). The ABC rule has three elements: (1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event (i.e., the wrongful act or omission of A toward B). *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 123–25, 330 P.3d 190 (2014). All three elements are satisfied here. Kassab forged a third page to the guaranty. Kassab deposed and subpoenaed individuals and entities unconnected with the litigation. The Owners, pursuant to indemnity agreements, had to reimburse the unaffiliated entities for their fees and costs. No other reason apart from Kassab's wrongful act brought the property-management company and lender into the lawsuit. Fees incurred by attorneys independently

representing third parties unrelated to this litigation are properly allowed as damages under the ABC rule.

6. The trial court properly exercised its discretion in refusing to allow Scott Whipple's testimony to testify at the fees hearing.

This Court reviews the decision to exclude an expert witness's testimony for abuse of discretion. *Driggs v. Howlett*, 193 Wn. App. 875, 896, 371 P.3d 61 (2016); *Litts v. Pierce County*, 9 Wn. App. 843, 846–47, 515 P.2d 526 (1973) (holding that trial court did not abuse its discretion in excluding expert testimony). A court abuses its discretion in excluding expert testimony "when its decision is manifestly unreasonable or based on untenable grounds or reasons." *Aubin v. Barton*, 123 Wn. App. 592, 608, 98 P.3d 126 (2004). "To be admissible, expert witness testimony must be relevant and helpful to the trier of fact." *Stedman v. Cooper*, 172 Wn. App. 9, 16, 292 P.3d 764 (2012).

At the fees hearing, the trial court excluded the expert testimony of Scott Whipple but allowed Kassab's counsel to make an offer of proof. RP (Dec. 3, 2015) at 33–34, 116, 117–28. Kassab did not disclose Whipple as an expert witness until a week before the fees hearing and never disclosed the substance of Whipple's testimony before the hearing. RP (Dec. 3, 2015) at 21, 31.

The trial court properly exercised its broad discretion to exclude Whipple's testimony. Much of Whipple's testimony related to his review of the record about fees charged by Kassab's law firm, Garvey Schubert Barer, in this underlying litigation for a fees dispute between Kassab and Garvey

Schubert Barer in an Oregon State Bar arbitration hearing. RP (Dec. 3, 2015) at 119–20. This testimony was neither relevant nor helpful to the trier of fact in determining an amount of reasonable attorney's fees in *this matter*. *See* RP (Dec. 3, 2015) at 31, 79–80. Allowing Whipple to testify would have prejudiced the Owners. Whipple's late disclosure prejudiced the Owners' ability to prepare for the fees hearing.

The trial court found that it would not have considered Whipple's testimony even if he had been permitted to testify. CP 9576. "An evidentiary error requires reversal only if it results in prejudice; only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred." *King County v. Vinci Constr. Grands Projects*, 191 Wn. App. 142, 182, 364 P.3d 784 (2015) (internal quotation marks and citation omitted). Kassab has not argued that the exclusion of Whipple's testimony resulted in any prejudice. Although the trial court excluded Whipple's testimony, it did not preclude Kassab from challenging the propriety or reasonableness of the fees award. RP (Dec. 3, 2015) at 50–62 (questioning basis of Talmadge's expert opinion), 67–111 (Sand's direct examination); CP 8701–15 (Sand's Declaration).

7. The trial court properly considered Thomas Sand's expert testimony.

Kassab argues the trial court erred in failing to consider "the only analysis before it of the reasonableness of the hours" billed: his expert witness Thomas Sand's testimony. Appellants' Br. at 32. Contrary to Kassab's assertions, the trial court did properly consider expert testimony in

evaluating the reasonableness of the Owners' fees request. RP (Dec. 3, 2015) (fees hearing expert testimony) 50–66 (Talmadge), 67–116 (Sand); CP 8002–11 (Talmadge Declaration); CP 8701–15 (Sand Declaration); CP 9332–37 (Talmadge Supplemental Declaration). The trier of fact assesses the credibility of witness testimony and the weight to give it. *Grove v. Peacehealth St. Joseph Hosp.*, 182 Wn.2d 136, 145, 341 P.3d 261 (2014). This Court cannot substitute its judgment for the trier of fact's but must defer to the trier of fact who weighs the testimony, resolves conflicting testimony, and evaluates witness credibility. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002); *Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999).

Sand was not the only expert that testified and submitted a declaration concerning the reasonableness of fees. Both parties submitted expert declarations, and both parties' experts testified at the fees hearing. The trial court did not find Kassab's expert's testimony credible because Sand admitted in his declaration that he had not fully reviewed the entire record and had only a "general understanding of the factual and procedural background of the case." CP 9575 (citing CP 8704 ¶ 8 (Sand Declaration)). Instead, the trial court found the Owners' expert Talmadge's length and depth of experience "compelling" and analysis "thorough and well-reasoned." CP 9576. The court found Talmadge's opinion "helpful" to the determination of reasonableness. CP 9576.

Kassab complains about the trial court's refusal to engage in an hour-by-hour analysis of the Owners' counsel's time entries. CP 9595–99.

But "meaningful review" does "not ordinarily require such details as an explicit hour-by-hour analysis of each lawyer's time sheets." *Progressive Animal Welfare Soc'y v. Univ. of Washington*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989). The same trial judge presided over the entire case and was in the best position to determine the reasonableness of fees without an hour-by-hour analysis. Even though the trial court did not find Sand's testimony "helpful" to determine reasonableness, it nonetheless carefully addressed each of Sand's objections to the Owners' fees request.

First, the Owners' redactions of time entries in billing records to protect privileged information does not render the billing records inadequate. *Beckman v. Wilcox*, 96 Wn. App. 355, 368–69, 979 P.2d 890 (1999). The entries generally describe the nature of the services rendered, the people involved, and the fees charged. Some entries do contain redacted portions, but those portions still specifically describe the nature of the services rendered and the fees billed. *E.g.*, CP 8324–27.

Second, the expenses and costs sought by the Owners were reasonable. Sand generally attacked the Owners' counsel's litigation strategy. Kassab questions the fees awarded for time billed to the Owners' experts and consultations and the expenses incurred in recording depositions. Appellants' Br. at 38. But it is not the trial court's role to second guess in hindsight litigation strategy. *See Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 422, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 699 (9th Cir. 1996) (refusing to second guess plaintiffs'

litigation strategy in a reasonableness-of-fees determination based on time spent on discovery and on preparation for summary judgment). While the Owners consulted several experts to establish (1) the Owners suffered financial harm, (2) the guaranty's third page was a forgery, and (3) the property management standard of care, the Owners received reports only from the forensic document examiners (Hicks and Green) and an IT Specialist. CP 9194–96 ¶¶ 7–9. The $118,000 incurred by the Owners on training and use of an electronic discovery product was necessary to perform adequate document review in a case involving more than 500,000 documents. Administrative tasks are properly recoverable as "costs" and "expenses" under the attorney's fee provisions of the guaranty and lease. *See Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn. App. 389, 409, 245 P.3d 779 (2011).

F. The trial court properly exercised its broad discretion in awarding reasonable expenses and fees as an alternative basis under RCW 4.84.185.

The trial court alternatively awarded the Owners fees under RCW 4.84.185 "to make the Owners whole again in light of the strong showing of fraud." CP 9603. This Court reviews a fees award under RCW 4.84.185 for abuse of discretion. *Koch v. Mut. of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698 (2001).

RCW 4.84.185 authorizes a trial court to award the prevailing party reasonable expenses and fees incurred in opposing a frivolous action advanced without reasonable cause. *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 343, 314 P.3d 729 (2013). An action is frivolous if it cannot

be supported by any "rational argument on the law or facts." *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82 (1989). An action must be frivolous as a whole to support a fees award under RCW 4.84.185. *Ahmad*, 178 Wn. App. at 344.

1. Kassab has abandoned on appeal any challenge to the summary judgment in the Guaranty Case, including a challenge to the contract basis upon which the trial court awarded fees.

Kassab has abandoned any challenge to the personal guaranty's validity for the full lease term. While the Guaranty Case was consolidated *at Kassab's request*, it embodied a separate claim for declaratory relief that the trial court resolved on summary judgment in the Owners' favor. Kassab does not challenge that decision. Kassab may certainly challenge the amount of fees awarded in litigating the Guaranty Case. *See Lay v. Hass*, 112 Wn. App. 818, 822–23, 826–27, 51 P.3d 130 (2002) (allowing the party against whom summary judgment was granted to challenge only the amount of the fees award on appeal). But Kassab has waived the right to challenge the contract basis upon which rests the Owners' right to recover fees under the personal guaranty.

2. A wrongdoing party that successfully moves the trial court to consolidate actions should be estopped from arguing on appeal that RCW 4.84.185 does not apply because the actions are not frivolous *as a whole.* The Supreme Court's language in *Biggs* requiring that the action be frivolous "in its entirety" is dicta and is not binding on this Court.

Kassab moved below to consolidate the Guaranty Case and the Lease Case. CP 9277–82. The Owners vigorously opposed consolidation. CP 1816–24; RP (Aug. 8, 2014) at 9, 11–12. The trial court rejected the Owners' argument that the two cases are unrelated and consolidated the two actions *at the wrongdoing party's request* "for reasons of judicial economy and to avoid unnecessary costs and delay." CP 1817, 1821, 1886–87, 9277–82.

Kassab argues that RCW 4.84.185 does not provide a valid basis on appeal to support the trial court's fees award because the claims in the consolidated actions were not frivolous as a whole. This is so, according to Kassab, because his breach-of-lease claim for failure to maintain common areas was not frivolous. But Kassab should be estopped from arguing on appeal that the action was not frivolous as a whole because the cases were consolidated at his request. *See* CP 9278 (asking the trial court to consolidate the cases "to resolve all related controversies between the parties in one action."); CP 9280–81 ("The two lawsuits share common and overlapping issues of fact. Both suits stem from and involve the parties' relationship as landlord and tenant. Directly implicated in both actions are the terms of and performance under the Lease and the Guaranty.").

This Court reviews a statute's meaning de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The fundamental goal of statutory construction is to ascertain the legislature's intent based on the statute's plain language. *Id.* at 9–10.

Some Washington courts have stated that an action must be frivolous "in its entirety" or "as a whole" to support a fees award under RCW 4.84.185. *See, e.g.*, *Biggs v. Vail*, 119 Wn.2d 129, 136–37, 830 P.2d 350 (1992); *Ahmad*, 178 Wn. App. at 344. Before the statute was amended in 1991 to its current version, RCW 4.84.185 expressly required that the action be frivolous "as a whole." Laws of 1987, ch. 212, § 201. The legislature's 1991 amendment to the statute deleted the phrase "as a whole." Laws of 1991, ch. 70, § 1. A "change in legislative intent is presumed when a material change is made in a statute." *Darkenwald v. State Emp't Sec. Dep't*, 183 Wn.2d 237, 252, 350 P.3d 647 (2015) (internal quotation marks and citations omitted).

Our Supreme Court first interpreted this statutory change in *Biggs*. The court in *Biggs* noted that the legislative history of the 1991 amendment shows "the lawsuit or defense is to be considered *as a whole* and not on a claim by claim basis." *Biggs*, 119 Wn.2d at 136. But the court did not apply the amended version of the statute. *Id.* Its discussion of the statute's meaning is therefore dicta and not binding on this Court. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013); *see also Gilmour v. Longmire*, 10 Wn.2d 511, 516, 117 P.2d 187 (1941) (holding that statements not necessary to the decision of

any issue in the case are dicta that do not control future cases); *Jeffery v. Weintraub*, 32 Wn. App. 536, 540 n.3, 648 P.2d 914 (1982) (stating that the Supreme Court's interpretation of a statute that had no bearing on the pertinent issue is mere "dicta").

RCW 4.84.185 states:

> In any civil action, the court . . . may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action[.]

Nowhere does the statute expressly require that an action be frivolous in its entirety or as a whole to recover fees. The legislature expressly deleted the phrase "as a whole" from the 1991 amendment. The legislature's amendment must have intended to change the statute's purpose. No Washington court has applied RCW 4.84.185's "in its entirety" or "as a whole" standard to a consolidated action. Fee awards under cost-shifting statutes should include consideration of the statute's purpose. *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009). To accept Kassab's argument here would frustrate the statute's purpose to discourage abuses of the legal system and "to compensate those parties forced to defend against a frivolous claim or defense." *Racy*, 149 Wn. App. at 316. This Court should affirm the trial court's fees award under the alternative basis of RCW 4.84.185.[10]

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[10] The trial court supported its fees award on two independent bases. This Court need not address the alternative basis under RCW 4.84.185 supporting the fees award if the Court affirms the fees award on the contract basis.

3. The trial court properly struck Ed Gambee's declaration testimony from the record.

The trial court struck Ed Gambee's declaration testimony at the fees hearing. RP (Sept. 23, 2015) at 22; CP 9050–51. This Court reviews a trial court's decision to exclude evidence for abuse of discretion. *Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.*, 186 Wn.2d 336, 376 P.3d 372, 379 (2016).

Kassab attached Gambee's declaration to his response to the Owner's motion for fees and expenses. CP 8622–45, 8646–48. Gambee stated under oath that Kassab's personal guaranty for the lease was limited to 10 years and consisted of three pages. CP 8648 ¶ 9. Kassab argues Gambee's declaration should have been admitted to show Kassab's reasonable belief in the existence and authenticity of the guaranty's third page. Kassab had the opportunity to submit Gambee's declaration at summary judgment but failed to do so. CP 8647 ¶¶ 1–2 (showing Kassab's longstanding relationship with Gambee pre-dating this case). Kassab's sole purpose in submitting Gambee's declaration was to relitigate the Guaranty Case and to create a fact question about the guaranty's third page. Kassab cites no authority that a party may submit *new* evidence to show "reasonable cause"—and avoid application of RCW 4.84.185—in a post-judgment fees motion. This Court should conclude that the trial court properly exercised its discretion in excluding Gambee's declaration testimony.

4. The record does not support Kassab's contention that he reasonably believed the guaranty's third page was genuine.

To support a fees award under RCW 4.84.185, the trial court must find that the action was "advanced without reasonable cause." Despite declaration testimony from two experts concluding that the guaranty's third page was a forgery and the discovery master's finding of a "very strong showing of fraud" perpetrated by Kassab, Kassab continued to advance the position that the third page was authentic. Kassab incredibly claims on appeal that he reasonably believed the guaranty's third page was genuine, citing his self-serving testimony. But the record belies Kassab's contentions: (1) Kassab's files and internal email correspondence included a two-page guaranty; (2) Kassab never produced an original of the guaranty's third page; and (3) no third party conceivably connected to the litigation (apart from Kassab's lawyers) produced a copy of the guaranty's third page in discovery. The record supports the trial court's determination that Kassab's claims and defenses were frivolous and advanced without reasonable cause.

5. The Owners' request for fees under RCW 4.84.185 was not moot because RCW 4.84.185 provides an independent basis for a fees award.

Kassab claims the trial court did not need to "reach the more extraordinary RCW 4.84.185 remedy as the same relief is available and was awarded under the lease and guaranty." Appellants' Br. at 47. Kassab cites no authority that a trial court cannot award reasonable attorneys' fees under two independent bases. An award of fees under RCW 4.84.185 is

fundamentally different and serves an entirely different purpose than an award of fees based on contract. Unlike an award based on contract, RCW 4.84.185 is not subject to the lodestar analysis. *Racy*, 149 Wn. App. at 314–16 (holding that the trial court did not abuse its discretion by not following the lodestar formula for an attorney's fee award under RCW 4.84.185). RCW 4.84.185 provides an additional basis for a fees award.

G. This Court should not bar the trial court from proceeding with the *in camera* review of Kassab's attorneys' files, in the event of a remand for further proceedings.

Kassab asserts that the discovery master's order, finding the case for an *in camera* review of Kassab's attorney's files had been made out under the crime--fraud exception to the attorney-client privilege, is moot and that this Court should bar any such review in the event of a remand. Kassab did not assign error to the discovery master's conclusion that an *in camera* review was warranted because the showing of fraud had been made. And, should the Court remand on the limited issue of breach of the lease, the *in camera* review could reveal that those claims were knowingly tainted by fraudulent conduct. Whether to go forward with that review should be left to the trial court's discretion.

VI. RAP 18.1 FEE REQUEST

The Owners request an award of its fees and costs on appeal under the same authority by which the trial court awarded fees: the lease, the guaranty, and the frivolous litigation statute. CP 7969–98 (motion for fees award), 9052–9192 (reply in support of motion for fees award), 9571–9603 (opinion and order on fees). Such an award is necessary to avoid diluting

the effect of the fees award against Kassab, under both the lease and the frivolous litigation statute. When a party has demonstrated intransigence at trial, to appeal the result may justify a corresponding award of attorney's fees on appeal to a prevailing respondent. *See Marriage of Wallace*, 111 Wn. App. 697, 710, 45 P.3d 1131 (2002); *Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999). A similar rule should apply in an appeal from a fees award under the frivolous litigation statute.

VII. CONCLUSION

This Court should affirm the trial court's summary-judgment order and order awarding the Owners attorneys' fees, expenses, costs, and disbursements. The Owners should also be awarded their attorneys' fees for this appeal.

Respectfully submitted this 7th day of December, 2016.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Michael B. King, WSBA No. 14405
Jason W. Anderson, WSBA No. 30512
Rory D. Cosgrove, WSBA No. 48647
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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James I. Holland Holland Law Group 1109 Broadway St Vancouver WA 98660-3237 jimsr@hollandgroup.com	James J. Holland Holland Law Group 7900 SE 28th St Ste #500 Mercer Island WA 98040-6004 jim@hollandgroup.com
Neil N. Olsen Sean M. Mazorol Zupancic Rathbone Law Group, PC 4949 Meadows Rd Ste 600 Lake Oswego OR 97035-6101 neil@zupgroup.com sean@zupgroup.com	Montgomery W. Cobb Montgomery W. Cobb, LLC 1001 SW 5th Ave Ste 1100 Portland OR 97204-1127 mwc@montycobb.com
Tonya R. Rulli Law Office of Tonya Rulli 514 W 9th St Vancouver WA 98660-3026 tonya@tonyarullilaw.com	Curtis A. Welch Duggan Schlotfeldt & Welch PLLC 900 Washington St Ste 1020 PO Box 570 Vancouver WA 98666-0570 cwelch@dsw-law.com
Terri A. Merriam Merriam and Associates, P.C. 5729 Lakeview Dr Ste 110 Kirkland WA 98033 tamerriam@merriamandassociates.com	

DATED this 7th day of December, 2016.

Patti Saiden

Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

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